



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R2-ES-2021-N195; FXES11140200000–223–FF02ENEH00]

Application for an Incidental Take Permit; Oil and Gas Habitat Conservation Plan for the Lesser Prairie-Chicken; Colorado, Kansas, New Mexico, Oklahoma, and Texas

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice advises the public that LPC Conservation LLC (applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit (ITP) supported by the *Oil and Gas Habitat Conservation Plan for the Lesser Prairie-chicken; Colorado, Kansas, New Mexico, Oklahoma and Texas* (HCP). The applicant has applied to the Service for the ITP pursuant to the Endangered Species Act. The requested ITP, if approved, would authorize incidental take of the lesser prairie-chicken (*Tympanuchus pallidicinctus*; LEPC) resulting from activities covered by the HCP (e.g., all activities associated with oil and gas upstream and midstream buildout, including ancillary (e.g., access road) ground disturbing activities associated with these project types) and would authorize incidental take resulting from conservation actions taken to avoid, minimize, and mitigate impacts of incidental take to LEPC that result from covered activities. If approved, the requested ITP would become effective should the LEPC become federally listed during the life of the ITP and HCP. With this notice we announce the availability of a draft environmental assessment (EA) that has been prepared to evaluate the ITP application in accordance with the requirements of the National Environmental Policy Act. We are making the ITP application package, including the HCP and draft EA, available for public review and comment.

DATES: *Submission of comments:* We will accept comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: *Obtaining documents:* You may obtain copies of the ITP application, HCP, draft EA, or other related documents on the internet at <https://www.fws.gov/southwest/es/ArlingtonTexas>.

Submitting comments: You may submit written comments by email to arles@fws.gov. Please note that your comment is in reference to the above-referenced HCP. For more information, see **Public Availability of Comments**.

FOR FURTHER INFORMATION CONTACT: Debra Bills, Field Supervisor, U.S. Fish and Wildlife Service, Arlington, Texas, Ecological Services Office; telephone 817–277–1100. Hearing or speech impaired individuals may call the Federal Relay Service at 800–877–8339 for TTY service.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), make available the *Oil and Gas Habitat Conservation Plan for the Lesser Prairie-chicken; Colorado, Kansas, New Mexico, Oklahoma and Texas* (HCP). The LPC Conservation LLC (applicant) has applied for an incidental take permit (ITP). If approved, the requested ITP would become effective and authorize incidental take of the lesser prairie-chicken (*Tympanuchus pallidicinctus*; LEPC) should the LEPC become federally listed during the life of the ITP and HCP under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*).

We are considering issuing a section 10(a)(1)(B) ITP for the LEPC, a species that is not currently listed under the ESA, in response to the applicant’s application and supporting HCP. While our 2016 revised HCP handbook (Handbook) provides guidance that an ITP and supporting HCP include at least one ESA-listed animal species, the issuance of this ITP could provide for LEPC conservation in several ways. First, the

proposed HCP may meet the Service's conservation recommendation for the LEPC because it emphasizes avoidance and minimization and focuses mitigation in areas that can serve as conservation strongholds for this species. Depending on enrollment, this mitigation strategy could help to preclude the need to list the LEPC or could help to recover the LEPC, if the LEPC is listed in the future. Second, the proposed HCP would provide taxpayer and industry savings in the use of an overarching conservation planning strategy. In contrast, the processes of developing a candidate conservation agreement with assurances (CCAA) prior to a future listing and then developing an HCP or multiple HCPs after a potential future listing would be inefficient for both the Federal agency and industry participants. The proposed HCP would be more efficient because potential participants could enroll on a project-by-project basis either before or after a potential future listing. This allows for greater, more consistent, and more predictable conservation efforts to be undertaken. Third, with this proposed HCP, the Service would issue a permit that does not go into effect until a future listing, if one occurs. This is the same as our practice for permits associated with CCAs, and ITPs associated with multi-species HCPs that include unlisted species. Although the permit would not go into effect until a future listing, if it occurs, participants would be required to implement all conservation activities identified within the HCP at the time they enroll, providing for prelisting conservation of the covered species. Finally, the proposed HCP would support States' ability to manage the unlisted species, similar to how a CCAA would support this, in that the proposed ITP does not become effective until such time that the covered species may be listed. Prelisting participation is voluntary for participants, and provides the affected States with continued regulatory authority regarding wildlife species.

We believe that considering an HCP without a currently listed species is supported by the House Conference Report (Conference Report) to the 1982 ESA amendments that created HCPs, which expressly considered both listed and unlisted

species (H.R. Report No. 97–835, at 30 (1982)). The Conference Report states that “although the conservation plan is keyed to the permit provisions of the Act [ESA] which only apply to listed species, the committee intends that conservation plans may address both listed and unlisted species.” *Ibid.* The Conference Report continues by stating that the inclusion of unlisted species supports the Congressional purpose that species not be viewed in isolation but in terms of their relationship to the ecosystem as a whole. This broad view of conservation, including conservation planning and permitting for unlisted species, is “consistent with the purposes of several other fish and wildlife statutes (e.g., Fish and Wildlife Act of 1956, Fish and Wildlife Coordination Act) which are intended to authorize the Secretary to cooperate with the States and private entities on matters regarding conservation of all fish and wildlife resources of this nation.” *Ibid.* The Conference Report encourages the Secretary to develop “creative partnerships between the public and private sectors” and notes that the Secretary “may utilize this provision to approve conservation plans that provide long-term commitments regarding the conservation of listed as well as unlisted species.” *Ibid.*

Through the proposed minimization and mitigation measures, the HCP would provide long-term commitments regarding the conservation of LEPC that would fully offset impacts to the species associated with habitat loss and fragmentation resulting from implementation of the covered activities by participants in the HCP. The HCP would provide opportunities for voluntary pre-listing conservation that may be used to evaluate the species’ status in a future listing decision, and potential participants would have the option to enroll in the HCP prior to or after a potential future listing decision. As such, processing the ITP application and HCP under section 10(a)(1)(B) of the ESA could provide for long-term conservation for the LEPC and more flexibility and long-term regulatory certainty for participants, as described above.

Based on the information above, we have determined that processing this ITP

application and HCP is consistent with the Conference Report and current regulations, and, therefore, we may process this ITP application and HCP under section 10(a)(1)(B) of the ESA and its implementing regulations (50 CFR 17.22(b) and 50 CFR 17.32(b)).

In accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*), we advise the public that:

1. We have prepared a draft EA to evaluate the ITP application. We are accepting comments on the ITP application and draft EA.
2. The applicant has developed an HCP, which describes the measures the applicant has volunteered to take to meet the issuance criteria for a 10(a)(1)(B) ITP associated with an HCP. The issuance criteria for HCPs are found at 50 CFR 17.22(b)(2) and 50 CFR 17.32(b)(2).
3. The HCP would be implemented by those parties who voluntarily enroll, providing conservation upon enrollment, but the subject ITP would not be effective until such time as the covered species may be listed in the future. The ITP would be effective only for those participants fully implementing the conservation plan.
4. As described in the HCP, the potential incidental take of LEPC could result from otherwise lawful, voluntary activities covered by the HCP.
5. We have included the alternative of issuing an enhancement of survival permit (ESP) under section 10(a)(1)(A) of the ESA, the CCAA Policy, and implementing regulations (50 CFR 17.22(d) and 50 CFR 17.32(d)), and we will accept comments related to this alternative.

Background

Section 9 of the ESA and our implementing regulations at 50 CFR part 17 prohibit the “take” of fish or wildlife species listed as endangered or threatened. Take is defined under the ESA as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,

or collect listed animal species, or to attempt to engage in such conduct” (16 U.S.C. 1538(19)). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed species. “Incidental take” is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity.

Regulations governing such take of endangered and threatened species are found at 50 CFR 17.21–22 and 50 CFR 17.31–32, respectively.

Proposed Action

The proposed action involves the issuance of a 10(a)(1)(B) ITP to the applicant and approval of the proposed HCP. The ITP would cover incidental “take” of the LEPC associated with oil and gas upstream and midstream buildout, including ancillary (e.g., access road) ground-disturbing activities associated with these project types within the HCP permit area that could affect potentially suitable LEPC habitat (the “covered activities”). In addition, the covered activities include grassland improvement and management activities that could occur in potential LEPC habitat on mitigation parcels to manage the parcel for LEPC. Beyond initial construction of a project, other ground-disturbing activities could occur during some types of repairs required during the operations and maintenance phase, project repowering, or project decommissioning within the permit area.

The requested term of the ITP is 30 years, and the ITP would authorize incidental take of LEPC associated with impacts on up to 500,000 acres of suitable LEPC habitat within the plan area (approximately 1.7 percent of the 30,178,085 total acres of potentially suitable LEPC habitat within the plan area) resulting from implementation of the covered activities by participants in the HCP.

To meet the requirements of a section 10(a)(1)(B) ITP, the applicant has developed, and proposes to implement, the HCP, which describes the conservation measures the applicant has voluntarily agreed to undertake. These measures will be

implemented prior to or concurrent with proposed impacts. These measures include LEPC habitat conservation through enhancement and restoration. On average, for every acre of LEPC habitat impacted, 2 acres of perpetual LEPC habitat conservation would be required. Of those 2 acres, 1 acre would consist of restoration and the other acre would consist of enhancement. Restoration actions include removal of woody vegetation encroachment, removal of infrastructure, and conversion of cropland to grasslands. Enhancement efforts primarily include actions to maintain or enhance the quality of existing LEPC habitat, such as prescribed burning, prescribed grazing, and chemical and mechanical manipulation of the vegetative community. Implementation of the proposed LEPC habitat conservation measures are projected to result in no net loss of LEPC habitat. The ITP would authorize incidental take that may result from the implementation of the proposed conservation measures, including activities occurring on mitigation parcels that, while providing a long-term benefit to LEPC, may have temporary impacts to the species.

The HCP, including the proposed conservation measures, was developed in coordination with the Service. Implementation of the HCP requirements, including the conservation measures, would be required for all participants in the HCP regardless of the listing status of the LEPC. The proposed conservation measures, once implemented, would fully offset impacts to the LEPC associated with habitat loss and fragmentation resulting from implementation of the covered activities.

Alternatives

We are considering two alternatives to the proposed action as part of this process: Issue an ESP for a CCAA, and a No Action Alternative.

1. *Issue an Enhancement of Survival Permit for a Candidate Conservation Agreement with Assurances*

Under this alternative, instead of approving the HCP and issuing an ITP,

the Service would issue an ESP pursuant to section 10(a)(1)(A) of the ESA, supported by a CCAA, to the applicant for incidental take associated with the covered activities in the CCAA. The proposed covered activities in the CCAA would be the same as those proposed in the HCP. The permit term for the ESP would be 30 years. Under this alternative, it is assumed the applicant (in the role of CCAA administrator) would require enrolled projects to implement all the avoidance, minimization, mitigation, monitoring, adaptive management, and reporting processes described in the HCP as part of the CCAA. It is anticipated that a similar level of oil and gas development within the permit area would occur under an HCP or a CCAA for each project. However, the enrollment of projects under the CCAA would end on the future date of a possible listing of the covered species, whereas the HCP enrollment would continue for the duration of the permit. We anticipate that this alternative would result in the same level of potential impacts to LEPC and the same level of LEPC conservation as what is proposed in the HCP for those enrolled prior to listing; however, projects after a potential listing would need to develop their own HCPs or find an alternative coverage for incidental take. This action would be consistent with existing Service guidance for conservation actions of unlisted species.

2. *No Action Alternative*

Under this alternative, the Service would not issue an ITP or an ESP, and therefore this programmatic permitting structure would not be available for willing participants. While the LEPC remains unlisted, potentially participating entities (i.e., oil and gas companies) would have little economic or legal incentive to voluntarily initiate the conservation or

management activities that are proposed in the HCP to benefit the LEPC. Therefore, unless potentially participating entities voluntarily participate in another programmatic permitting option, should one be available, or voluntarily develop their own standalone permitting option, conservation measures above and beyond those directed by existing Federal, State, and local laws, policies, or regulations likely would not be implemented, and the LEPC would not gain additional protections and conservation benefits over what currently exist. On private lands, where the State or Federal government has no authority to protect or direct the management of LEPC habitat, LEPC conservation programs would be implemented entirely at the discretion of the landowners and private developers.

Next Steps

We will evaluate the permit application, HCP, associated documents, and comments we receive to determine whether the ITP application meets the requirements of ESA, NEPA, and implementing regulations, or whether the issuance of an ESP should be considered. If we determine that all requirements are met, we will approve the HCP and issue the ITP under section 10(a)(1)(B) of the ESA (16 U.S.C. 1531 *et seq.*) to the applicant in accordance with the terms of the HCP and specific terms and conditions of the authorizing ITP. Alternatively, we could approve this plan as a CCAA and issue an ESP under section 10(a)(1)(A) of the ESA and applicable regulations if we determine that all requirements of the ESA, NEPA, and implementing regulations are met. We will consider comments on both the alternative and the denial of issuing a permit in our final decision. We will not make our final decision until after the 30-day comment period ends, and we have fully considered all comments received during the public comment period.

Public Availability of Comments

All comments we receive become part of the public record associated with this action. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, NEPA, and Service and Department of the Interior policies and procedures. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

We provide this notice under the authority of section 10(c) of the ESA and its implementing regulations (50 CFR 17.22 and 50 CFR 17.32) and NEPA (42 U.S.C. 4371 *et seq.*) and its implementing regulations (40 CFR 1506.6).

Amy L. Lueders,

Regional Director, Southwest Region,

U.S. Fish and Wildlife Service.